No. 87-1239

In the Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT, U.S.
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JOSEPH F. SPANIOL, JR.
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ELIZABETH A. BLOOR
and
WILBUR H. FRIEDMAN, JR.,
Petitioners

v.

MONTGOMERY COUNTY, MARYLAND
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Where a state intermediate appellate court has issued an unpublished decision which in approach and outcome contradicts its own contemporaneous published decisions, whether, on a cost-benefit analysis, due process requires that the court be required to issue a published decision.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ELIZABETH A. BLOOR,
and
WILBUR H. FRIEDMAN, JR.
Petitioners

v.

MONTGOMERY COUNTY, MARYLAND
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioners Elizabeth A. Bloor and Wilbur H. Friedman, Jr., petition the Court to review the failure of the Court of Appeals of Maryland to remand this case to the Court of Special Appeals of Maryland, with directions to issue a published decision herein.

REFERENCE TO OPINIONS BELOW

The Appendix hereto contains: (1) The Court of Appeals' order denying motion for reconsideration and (2) denial of

petition for certiorari; (3) The Court of Special Appeals' decision and order, and (4) order denying motion for reconsideration; (5) the decision and order of the Circuit Court of Montgomery County; (6) The Decision of the Animal Matters Hearing Board for Montgomery County, herein "the agency"; and (7) the decision of the United States District Court dismissing a civil rights action herein.

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257(3) and Sec. 2101(c). The Court of Appeals' order denying Petitioners' motion for reconsideration is dated October 28, 1987.

STATEMENT

1. General Statement

This is a case of little practical importance except to the Petitioners.

Its general interest, if any, is best found in the administrative agency's and state courts' denial to Petitioners of rights conferred by valid ordinances of Montgomery County, Maryland. But it is also a case in which the Court of Special Appeals, in an unpublished decision, has applied rules of law which are directly contradictory to pronouncements of this Court and of Maryland's Court of Appeals, and to its own pronouncements made in published decisions. While Petitioners have already filed modest treatises on the divergence between the Court of Special Appeals' findings and conclusions in this case, on the one hand, and the requirements of due process [1] and the

1. After the Court of Special Appeals disposed of this case, and while it was pending before the Court of Appeals, Petitioners discovered that the agency based its decision on facts not in the record and a theory not advanced to it. Petitioners brought this information to the attention of the Circuit Court

hornbook rules of administrative law, on the other, Petitioners show a difference in approach and result between this decision and other contemporaneous decisions of the Court of Special Appeals which are **published.** They would thereby show that the Court of Special Appeals quite consciously utilized the form of an unpublished decision to apply a unique body of law in this case.

Petitioners promptly raised these issues to the Court of Special Appeals, in their motion for reconsideration, and to the Court of Appeals, in their petition for certiorari and motion for reconsideration.

2. The approaches taken and the

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1. for Montgomery County and, in Petitioner's motion for reconsideration, to the Court of Appeals. Neither was disposed to reverse the decision of the agency.

outcomes of the decisions of the Court of Special Appeals have been different depending on whether their decisions were published or unpublished.

A. The requirement of findings and reasons

In its published decisions, the Court of Special Appeals has required administrative agencies to make findings and state reasons.

Thus, for example, in **Ocean Hideaway Condominium Association v. Boardwalk Plaza Venture**, 68 Md. App. 650, 515 A.2d 485, 487 (1986), the court reversed and remanded a decision of the Board of County Commissioners because of the absence of findings and reasons. The court said, 515 A.2d at 487 that "even in the absence of a statutory requirement for written findings of fact, where findings of fact are not in the record,

the Court has remanded for the purpose of making such findings." As to reasons, the court at p. 488 cited with approval the words of Maryland's Court of Appeals that "the 'reasons' given by the [agency] for denying the application suggest a rather cavalier attitude in respect of its duties and responsibilities.... [C]itizens are entitled to more than a boilerplate resolution." And in **Tron v. Prince George's County**, 69 Md. App. 256, 517 A.2d 113, 121 (1986), the Court of Special Appeals reversed and remanded because of the absence of reasons why the firefighter's physical condition was "unrelated to his occupation as a Firefighter....The [agency] is required to give reasons for its decisions." [2]

In its unpublished decision in this

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2. Accord: **Crumlish v. Insurance Commissioner**, 70 Md. App. 182, 520 A.2d 738 (February 5, 1987).

case, in contrast, the Court of Special Appeals, Appendix p. 18, said:

> [Petitioners] complain that the Board's opinion does not contain proper findings of fact, but merely parrots the language of [the ordinance.] We do not agree. Under the circumstances, we believe the Board's requirements are adequate and comply with the statutory requirements. Although the feelings involved are complex, the facts are quite simple: since 1981, a number of large dogs have been living, mostly in the back yard, on a one-half acre lot in a residential neighborhood. During the hottest, most humid months of the year, 27 such dogs lived there. The noise and stench is easy to imagine. To require more specific fact finding in this case would be distasteful and unnecessary. [3]

In addition, the Court of Special Appeals supplied reasons to the agency to justify its decision. In its decision, the agency chose to rely only on the

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3. In point of fact, the agency's decision said no such thing. Aside from the boilerplate in the language of the ordinance, the sole finding of the agency, Appendix p. 27, was that "twenty-seven (27) dogs of various ages were owned and controlled by the Respondents during the year 1985 and at the present time there are eight (8) adult dogs owned and controlled on the Respondents' property."

number of dogs, although it could have relied on the size as well. The court said, Appendix, p. 17, that "We think by specifying the dogs as Irish Wolfhounds, the Board was, by implication, saying that these are large dogs."

B. Petitioners' arguments that a certain amount of barking and odors is incidental to the dog fancier operation permitted by county ordinance

In **Holbrook v. Board of County Commissioners of Cecil County**, 70 Md.App. 207, 520 A.2d 1096 (February 6, 1987), the Court of Special Appeals reversed and remanded a decision of the county board of appeals denying Holbrook a special exception to maintain a mobile

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3. Appendix, p. 18,19. Compare also **Cahill v. Montgomery County**, 72 Md. App. 274, 528 A.2d 527 (1987), where, in a Fourth Amendment case, the court found that there were 40 dogs on the premises, but said nothing to suggest that a large number of dogs is malum in se.

home because of the protest of a neighbor. The court found, 520 A.2d at 1101, that:

> The legislative body of Cecil County has determined that a mobile home is permitted as a special exception use... notwithstanding its lack of aesthetic appeal.... [T]he proper test to be applied by the [board of appeals] in determining whether to deny the special exception was whether evidence was presented which demonstrated that a mobile home on the appellant's land had any adverse effects on the neighboring properties above and beyond those inherently associated with such a special exception use irrespective of its location.... We hold that since there was no substantial evidence before the [b]oard of [a]ppeals to meet that test, the denial of the appellant's application was arbitrary, capricious, and illegal.

And in **Miller v. Maloney Concrete Company**, 63 Md. App. 38, 491 A.2d 1218 (1985), in which the court found improper the action of the board of appeals, the court said, 491 A.2d at p. 1224, fn. 2, and at 1225:

> Moreover, Section 59-A-5.7 [a section of the Montgomery County Zoning Code that permits the board to abate uses found to

constitute a public nuisance] has nothing to do with zoning or the zoning process; indeed it purports to authorize the board of appeals to act in complete derogation of the basic zoning law to declare illegal, and thus criminal, uses that are expressly permitted under the zoning law. It therefore may be questioned whether that section represents a proper exercise of the county's authority under the Park and Planning Commission law.... (at p. 1225) The board is authorized to prohibit that which is may be perfectly legal under the zoning laws, the air quality control law, the noise control law, and indeed under the common law of nuisance, and without any fixed criteria other than the listed sources of pollution.

In its unpublished decision in this case, in contrast, the Court of Special Appeals said (Appendix, p. 10):

[Petitioners] argue that because they live in an area of the county zoned R-60, where among the permitted land uses is the right to maintain a non-commercial kennel and to be a licensed dog fancier, the county has created a special property interest consisting of the right to maintain on the property numerous dogs that cannot be taken without cause. The short answer is that regardless of the permitted use in the abstract, a licensed dog fancier does not enjoy a greater right to maintain a public nuisance than does any other dog owner. The "cause" required to remove the nuisance is the same for licensed dog

fanciers as for ordinary dog owners.[4]

C. Remedial and punitive remedies

In **Anne Arundel County v. Beatty**, 69 Md. App. 424, 518 A.2d 147, 150 (1986), the Court of Special Appeals sustained a decision of a circuit court limiting the amount of damages to be paid to the county. The Court said:

> The clear thrust of both the State law... and the county law, with respect to an action for damages, is to permit the county to recover from the owner/applicant any cost to which it is put in doing what the law requires the owner/applicant to do. Although the state provision, to the extent of

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4. Petitioners argued that the dog fancier ordinance, by its terms, creates a right to maintain three or more dogs on the premises, and to breed up to five litters of puppies a year, and that a certain amount of noise and odors are associated with such an operation. Petitioners further argued that they were doing what the ordinance expressly permitted, and that to abate the right because of a necessary incident of its exercise, and on the basis of unsworn testimony which the agency accepts uncritically, renders the right, created by the ordinance, illusory. Petitioners' main brief to the Court of Special Appeals, pp. 15-17.

allowing double damages, is somewhat in the nature of a penalty, its principle function is a compensatory, not a punitive one. This is in accord with the commonly accepted notion of "damages" in both contract and tort actions.... Under this background, the weakness in the county's position becomes apparent. In the first place, there is no evidence that the county either has done any work at the site or incurred any cost of restoration) or that it necessarily ever will be required to do such work (or incur such cost). The court, through injunctive order, directed appellees to do the restoration work that the court found necessary, and that work has apparently been done by them, at their expense. For what purpose then, shall they pay damages to the county?

In the instant case, on the other hand, in which Petitioners argued that the remedy imposed by the agency was punitive, the Court of Special Appeals said (Appendix, p. 19):

Moreover, we do not agree that the abatement portion of the Board's order is arbitrary, capricious and unnecessarily harsh and punitive. We are not insensitive to the emotional pain of losing a pet. Nevertheless, we observe that while the Board had the authority to order all of the dogs destroyed [5] its

5. There is a body of caselaw and other authority (but not Maryland authority)

order stopped far short of that. As we have noted, [Petitioners] were offered the opportunity to keep two of their dogs, and to find homes for the others. The remedy fashioned by the Board is directly related to the problem [6], offers some flexibility to [Petitioners], and appears to take into account the interests of all concerned (including the dogs) [7]. We do not feel that it was arbitrary, capricious, or punitive in nature. The decision as to whether it was the best possible remedy in the circumstances was for the Board to make, using its own expertise. We are not at liberty to substitute our view for that of the Board.

D. Overly broad ordinances

In **5297 Pulaski Highway, Inc. v.**

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5. which holds the property destruction can be exercised only as a last resort. Petitioners' main brief to the Court of Special Appeals, pp. 27-28, fn. 20; p. 32, fn. 25.

6. Petitioners argued below, main brief to the Court of Special Appeals, pp. 26-27, that the portion of the agency's order which requires that the remaining dogs be kept inside the house between 10 p.m. and 7 a.m. goes beyond restoring the status quo ante and is therefore punitive.

7. Petitioners argued that they could remove the remainder of the dogs only to locations approved by the animal control officer, who could approve or disapprove the relocation without any limits on his discretion. Petitioners' main brief below, p. 28.

Town of Perryville, 69 Md. App. 590, 519 A.2d 206 (1987), the Court of Special Appeals sustained a city ordinance regulating adult book stores in which compliance was sought by means of an injunction. But the court, 519 A.2d at 212, quoted with approval the following language:

> A challenge on the basis of overbreadth raises two questions: whether the language of the statute reaches too broadly and proscribes protected conduct, and whether too much discretion is vested in the officials who administer the statute.

And in **Miller v. Maloney Concrete Company**, 63 Md. App. 38, 491 A.2d 1218 (1985), the court said, 491 A.2d at p. 1224-1225:

> The authority to control nuisances... has been exercised in comprehensive fashion by Montgomery County through the enactment of Chapters 3 and 31B of the county code which, together, vest jurisdiction to control nuisances arising from air and noise pollution in the director of the county department of environmental protection. A comparison of those chapters with [the section of the

Montgomery County Zoning Code that permits the board to abate uses found to constitute a public nuisance] is illuminating. Chapter 3... concerns air quality control. It empowers the director to "[s]upervise the execution of all laws, rules and regulations pertaining to air quality as defined in this chapter," to adopt regulations controlling emissions, and to order the abatement of certain nuisances. It defines the basic terms—"air pollution,"... and "nuisance." Except for noise, vibrations and "other disturbances," pollutants subject to the director's jurisdiction are precisely those mentioned in [the section of the Montgomery County Zoning Code that permits the board to abate uses found to constitute a public nuisance]--... odor. To be abated as "pollution," however, those substances must be present in the outdoor atmosphere "in such quantities and of such duration as are or may tend to be injurious to human, plant or animal life, or property, or which unreasonably interferes with with the comfortable enjoyment of life or property or with the conduct of business.... The same relative precision appears in the noise control law. The basic terms are defined; the prohibitions are clearly stated; hardship exemptions are allowed.... None of this appears in [the section of the Montgomery County Zoning Code that permits the board to abate uses found to constitute a public nuisance]. The board is authorized to prohibit that which is may be perfectly legal under the zoning laws, the air quality control law, the noise control law, and indeed under the common law of nuisance, and without

any fixed criteria other than the listed sources of pollution.

In the instant case, the Court of Special Appeals said, Appendix p. 7:

> [Even if the statute were a criminal one], [w]e believe that the language of the statute is sufficient to put any person of ordinary intelligence on notice that it is a violation to allow a dog to allow a dog to bark and howl, uncontrolled, day and night, and to allow large quantities of fecal matter to accumulate in his yard. It seems that [Petitioners] would not be satisfied unless the statute strictly spelled out the exact time and decibel limits for permissible howling and an exact quantification of permissible fecal matter in the yard. Such a statute is not required either by the constitution or by common sense.

3. The Court of Special Appeals has split the litigants appearing before it into two classes; the classifications are random; and the classification affects the court's decision.

The Court of Special Appeals has indicated no criteria, and Petitioners have uncovered none, which determine when the Court of Special Appeals issues a

published decision and when it issues an unpublished decision.

When does the Court of Special Appeals issue a published decision and when an unpublished one? The court has not told Petitioners and we have not divined the basis of its determination. As possibilities Petitioners have considered the practical importance of the case, and its legal significance, and whether the decision sustains the lower court or reverses it. But none of these seems to explain when the Court of Special Appeals will elect to publish a decision.

By the process of elimination, Petitioners are led to the conclusion that the Court of Special Appeals issues a published decision when it wishes to decide a case in accord within the framework of publicly proclaimed

principles, and issues an unpublished decision when it wishes to depart from those principles. Thus, in **Casper v. Chas. F. Smith & Son, Inc.**, 71 Md. App. 445, 526 A.2d 87 (1987), the court, at pp. 88-89, cited with approval an 1897 case stating that it is:

> far better that the established rules of law should be strictly applied... even though in particular instances serious loss may be thereby inflicted on some individuals, than that... long settled and firmly fixed doctrines should be shaken, questioned, confused, or doubted.... [A] rigid adherence to fundamental principles at all times...[is] the surest, if not the only means by which stability and certainty in the administration of the law may be secured.

Accordingly, the Court of Special Appeals has divided the litigants who appear before it into two classes, and, at least from the point of view of the litigant, the classification is random. The first class of litigants obtains a published decision, in which precedent is

followed, or advanced, or distinguished away, in accord with rules which will be followed in all other published decisions. For the second class of litigants, the court says whatever it thinks just. Accordingly, the classification results in a substantial difference in result. [8]

4. Merging the two classes into one would go far to remove an impediment to the achievement of equal justice under law, and to the achievement of predictability in the law. But the goal is not now easy to reach.

A. Petitioners would be delighted if the Court were to grant certiorari, examine the record, and reverse on the merits. But given the Court's case load, they cannot realistically hope for that

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8. Thus the classification is far less rational that the classification in **Logan v. Zimmerman Brush Co.**, 455 U.S. 422 (1982).

result. In addition, doctrines of issue preclusion make successful civil rights actions in the federal courts problematical. [9]

Issue preclusion can probably be largely avoided by suing the state court judges on a theory that they have committed a constitutional tort, but plaintiffs have rarely won such suits.

B. There is another way to achieve such a result, namely by requiring the Court of Special Appeals to issue a published decision. Indeed, due process, on a cost-benefit analysis, permits and requires such a result.

For the intermediate appellate court, published decisions are considerably more difficult to write

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9. The District Court has dismissed Petitioner Friedman's civil rights action, JH 86-3640, on abstention and issue preclusion grounds. Appendix, p. 35. Friedman has appealed.

than are unpublished decisions. But the whole point of the requirement is that it would be almost impossible to write a published decision that achieved the same outcome as this unpublished decision without causing a number of established principles to be "shaken, questioned, confused [and] doubted." An unpublished decision, well in the mainstream of the law, could easily have been written in this case, but it simply would have gone the other way. For the highest court of the state, there is little additional time over and above the time spent to review a petition for certiorari, to conclude that the decision is outside the mainstream of the law and to draft an order requiring the intermediate court to issue a published decision. An end to unpublished decisions in direct conflict with the mainstream of the law would

benefit all: judges of lower courts; the bar; litigants who have also received unpublished decisions in conflict with the mainstream — a class whose membership it is very difficult for private litigants to determine --; and all other litigants, for whom a secret law — and that is what the Court of Special Appeals has produced in cases such as this — is an abomination.

CONCLUSION

6. WHEREFORE, this Court should grant certiorari, and remand this case to the Court of Appeals with directions to remand to the Court of Special Appeals for the issuance of a published decision, or in the alternative, take such other action as is just and proper.

Respectfully submitted,

_____

Wilbur H. Friedman, Jr.
Counsel for Petitioner Bloor
and Petitioner, Pro Se

APPENDIX

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 792

September Term, 1986

ELIZABETH A. BLOOR, et al

v.

MONTGOMERY COUNTY, MARYLAND

Karwacki
Bell, R.M.
Wenner,

JJ.

PER CURIAM

Filed: March 17, 1987

In this appeal, Elizabeth Bloor and her husband, Wilbur H. Friedman, the appellants, urge us to reverse a judgment of the Circuit Court for Montgomery County (Raker, J.) which affirmed a decision and order of the Montgomery County Animal Matters Hearing Board. We shall affirm.

The Board is established by Section 5-9 of the Montgomery County Code (1984) and is comprised of five members: a representative of the Montgomery County Veterinary Medical Association, a representative of the Montgomery County Humane Society,1/ and three members of the general public, at least one of whom is to be a representative of a recognized animal fanciers' or animal breeding group. Section 5-12 of the County Code gives the Board authority, upon receipt of a written complaint and after holding an

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1/ The appellee has described this member as a representative of the "Montgomery County Human Society." Perhaps the key to understanding this case is that all five members are chosen from that group.

evidentiary hearing, Montgomery County Code, Section 5-12 (a) (3), to declare an animal or an animal facility a public nuisance, and to order the nuisance abated.2/

Section 5-25 of the County Code establishes standards and guidelines for the Board in making such a determination. That section provides, in pertinent part, that:

> It shall be grounds for a complaint and finding of a public nuisance pursuant to section 5-12 of this chaper for:
>
> ....
>
> (c) Any animal or animals to cause unsanitary, dangerous or offensive conditions by virtue of the size or number of animals maintained at a single location or due to the inadequacy of the facilities;
>
> (d) Any animal to make or cause noises audible within a building on adjacent property and of sufficient volume so as

2/ The proceedings of the Board are governed by the county's Administrative Procedures Act, Chapter 2A of the Montgomery County Code. Appellants do not challenge the procedures provided therein; they are simply asserting that the Board failed to meet the proper standard for an agency decision.

to disturb the quite enjoyment of the occupants thereof.

While the appeal before us constitutes a broadside, it is this section of the County Code which appears to have drawn the heaviest fire.

Pursuant to Section 5-25, Margaret Lau filed a written complaint with the Board alleging that six Irish Wolfhounds and approximately six puppies owned by her neighbor, Ms. Bloor, were causing excessive noise and fecal odors. When the hearing was held a month later, there were eight adult Irish Wolfhounds living at the Bloor-Friedman residence.3/ As a result of the hearing the Board found that the noise and fecal odors coming from the dogs constituted a public nuisance. In order to abate the nuisance, appellants were ordered to deliver all of the dogs currently owned by them to the custody of the Montgomery County Animal

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3/ It appears that Ms. Bloor owns the dogs and Mr. Friedman owns the property.

Control Officer. They were given the option of keeping two dogs if: (1) within seven days they would turn over all but two of the dogs to the Animal Control Officer, or place all but two of the dogs elsewhere with that officer's approval, and no more than two dogs would be permitted at appellants' residence unless expressly authorized by the Board; and (2) any dogs remaining on appellants' property would only be permitted outside between the hours of 7:00 a.m. and 10:00 p.m., unless they were outside for "toilet purposes while on a leash and under the direct physical control of an adult."

As we have observed, on appeal, appellants have fired a broadside at the decisions of the circuit court and the Board, bolstered by 38 sub-arguments, and citing 77 cases, 13 statutes, and the Restatement of Torts and 58 AmJur 2d. For the sake of clarity, we have reframed the issues as follows:

I. Is Section 5-25 of the Montgomery County Code unconstitutional either on its face or in its application?

II. Was the order of the Board illegal, erroneous, or otherwise improper?

I.

For our guidance, appellants have offered a not altogether fascinating discourse on various principles of constitutional and administrative law. However fascinating, we are not at all sure how those principles connect to the case at hand. Nevertheless, we perceive that appellants' constitutional arguments are based upon the due process clause of the Fourteenth Amendment to the United States Constitution, since they are all variations upon a theme: "it's not fair." From that theme we discern four sub-complaints: (A) Section 5-25 of the County Code is "void for vagueness"; (B) the order of the Board is a "taking" without just compensation; (C) the County Code allows the Board unlimited

discretion; and (D) on the "sliding scale" or process due according to the affected interest, their interests weighed more than the process they received. We shall consider these complaints seriatim.

(A)

The appellants assert that Section 5-25 is unconstitutionally vague because it fails to provide adequate standards and guidelines by which to determine that dogs are a nuisance. Their argument is based on the doctrine that a statute which either commands or forbids the doing of an act in terms so vague that persons of ordinary intelligence must guess at its meaning and differ as to its application violates the constitutional guarantees of due process. See, Maryland National Capital Park and Planning Commission v. Mayor and Council of Rockville, 272 Md. 550, 325 A.2d 748 (1974). While their statement of the doctrine may be correct, the Court of Appeals has noted that it is rarely applied except in criminal cases. In those

rare cases where it has been applied to invalidate a non-criminal statute, it has been where the statute sought to impose "...the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." Id. at 559, quoting from Small Co. v. Am. Sugar Ref. Co., 267 U.S. 233, 239, 45 S. Ct. 295, 69 L.Ed. 589 (1925).

What we are concerned with here is a civil statute. Violation of an order of the Board is punishable as a class A civil violation, which carries a maximum fine of $250 for an initial offense and $500 for repeat offenses. Montgomery County Code, Sections 1-19, 5-15A. Nonetheless, we do not believe this distinction is decisive.4/ We believe that the language of the statute is sufficient to put any person of ordinary intelligence on notice that it is a violation

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4/ Compare Miller v. Maloney Concrete Company, 63 Md. App. 38, 491 A.2d 1218 (1985).

to allow a dog to bark and howl, uncontrolled, day and night, and to allow large quantities of fecal matter to accumulate in this yard. It seems that appellants would not be satisfied unless the statute strictly spelled out the exact time and decibel limits for permissible howling and an exact quantification of permissible amounts of fecal matter in the yard. Such a statute is not required by the constitution or by common sense.

(B)

Appellants' contention that the Board's order is a confiscatory "taking" of their property without just compensation ignores the distinction between the taking of property for a public purpose under the power of eminent domain, which requires compensation, and the abatement of a public nuisance under the police power, which does not. Bureau of Mines of Maryland v. George's Creek Coal and Land Company, 272 Md. 143, 321 A.2d 748 (1974); MacLeod v. Takoma Park, 257

Md. 477, 263 A.2d 581 (1970). Under Section 5-12 of the County Code the Board may issue a cease and desist, impoundment, payment of damages, destruction or other order or orders to abate a public nuisance. We conclude that the terms of the order issued by the Board in this case are well within the statute, and do not amount to a taking of property without due process of law.

(C)

The appellants' complaint that the Board enjoys unlimited discretion under the County Code is also without merit. The standards and guidelines provided in Section 5-25 sufficiently limit the discretion of the Board in its initial determination of whether a public nuisance exists. As to its powers to abate a public nuisance, the Board must have the flexibility to respond to the myriad of unique circumstances presented where animals are involved. The only discretionary portion of the Board's order in the case sub judice is the alternative offered to

appellants to keep two of the dogs on the property under certain conditions. We do not intend, in the interest of greater certainty, to strike that portion of the order, leaving only the absolute order to impound all of the dogs.

(D)

Appellants final contention is difficult to fathom, but it appears to be cased on the notion that they enjoy some type of "heightened" interest by virtue of Ms. Bloor's status as a licensed dog fancier. Thus, they argue that because they live in an area of the county zoned R-60, where among the permitted land uses is the right to maintain a non-commercial kennel and to be a licensed dog fancier, the county has created a special property interest consisting of the right to maintain on the property numerous dogs that cannot be taken without cause. The short answer is that, regardless of the permitted use in the abstract, a licensed dog fancier does not enjoy a greater right to

maintain a public nuisance that does any other dog owner. The "cause" required to remove the nuisance is the same for licensed dog fanciers as for ordinary dog owners.

II.

Finally, we turn our attention to the proceedings before the Board and its findings. The transcript of the hearing shows that appellants reside on a half acre lot in a residential neighborhood at 11404 Norris Drive, Silver Spring, Maryland. Ms. Bloor breeds Irish Wolfhounds, which, as a matter of common knowledge, are a very large breed of dogs. At the time of the hearing eight adult dogs were living on the property. Although Ms. Bloor normally breeds two litters of puppies a year, in July of 1985 three litters were born totalling about 23 puppies.5/ The puppies live on the property for at least their first eleven weeks.

5/ She testified that one of the litters was unplanned.

Four of appellants' neighbors testified at the hearing. Margaret Lau testified that at times the fecal odors had driven her family out of their yard. Nothing was done to alleviate the odors except when appellants were contacted by local authorities. In addition, Ms. Lau complained bitterly about the noise. She kept a log of the noise created by the dogs. Over a twenty-day period, she documented more than sixty instances of the dogs' barking, yapping and howling at times ranging from 6:22 a.m. to 11:20 p.m. According to Ms. Lau, the dogs bark whenever a nearby fire alarm goes off, when ambulances go by, when there is a squirrel in the vicinity, when there is another dog in the vicinity, when people pass by, when the dogs play, and for no reason at all. The feces from the dogs are neither buried nor picked up on a regular basis.

Carol Howley testified that the dogs disturbed her between the hours of 11:00 p.m. and 7:00 a.m.; she has heard them barking at

5:00 a.m. and in the middle of the night. She can hear them in her house when the windows are closed. More often that not, the dogs bark in chorus. The fecal odor, she stated, is "real obvious."

Suzy Leahigh testified that the fecal order permeates her property, so that she is unable to open her windows on the side of her house that adjoins the appellant's property. When she opens her door, the smell permeates her dining room. Laundry put out to dry has had to be rewashed because of the odor. She testified also that the dogs sometimes bark at night for 15 minutes at a time.

Edward Trowlinger testified that a very noticeable stink comes into his backyard from the appellant's property and that he doesn't entertain in his backyard anymore because his guests have complained about the noise. He said the dogs howl at night, pretty much all night long, and that many times he is unable to hear his television because the dogs are

howling. In addition, he said that he could smell the fecal odors in his den.

Ms. Bloor testified that she is aware that the dogs bark occasionally for up to five minutes. She also said that she sometimes finds the odor offensive, but she is more conditioned to it than her neighbors.

Based on this record, the Board issued its opinion and order. The opinion enumerates the following fact findings: that during the year 1985, 27 dogs of varying ages were owned and controlled by appellants, and that at the time of the hearing eight adult dogs resided with appellants; that the preponderance of the evidence showed that "the barking and howling of the dogs constitutes a public nuisance in that the dogs make or cause noise audible within a building on adjacent property and of sufficient volume so as to disturb the quiet enjoyment of the occupants of the Lau, Leahigh, Howley and Trowlinger residences"; and that the preponderance of the evidence

also showed that "the dogs owned and controlled by the [appellants] on their property constitute a public nuisance in that they create unsanitary and offensive conditions by virtue of the number of animals maintained at the facility and due to the inadequacy of the facility at the [appellants'] residence." We have already discussed the abatement provisions of the order.

Appellants' non-constitutional challenge can be broken down into three parts: (A) In affirming the Board's order, the circuit court applied the wrong standard of review and relied on facts outside of the record; (B) the Board's findings were not in compliance with the requirements of the County Administrative Procedure Act, and were unsupported by the evidence; and (C) the abatement portion of the order was arbitrary, capricious and unduly harsh and punitive.

(A)

Appellants take issue with the statement in the circuit court's opinion that "[t]he standard of review of administrative decisions is very narrow." They argue, in seeming contradiction, that a reviewing court enjoys great freedom to correct agency errors of law. However that may be, the determinations at issue here are of a factual nature -- do the noise and stench from appellants' property rise to the level of a "public nuisance" as defined by the County Code? If so, what is an appropriate remedy?

The circuit court correctly set out the limits of its review of the Board's determinations, and those limits are equally binding upon us. The decision of the Board is prima facie correct. Bullock v. Pelham Woods Apts., 283 Md. 505, 390 A.2d 1119 (1978). A reviewing court will not substitute its judgment for that of an administrative board when an issue is fairly debatable and the record contains substantial

evidence supporting the administrative decision. Annapolis v. Annapolis Waterfront Company, 284 Md. 383, 396 A.2d 1080 (1979). We see no evidence that the circuit court misunderstood or incorrectly applied those standards.

The appellants' assertion that the circuit court went beyond the findings of the Board is based on the court's statement that "The dogs housed on this property are adult Irish Wolfhounds, plus puppies. The adult dogs are a large breed." Appellants point out that the word "large" does not appear in the Board's opinion and order. Although it does not, the dogs are described as "Irish Wolfhounds." Appellants claim that the Board relied on the number of dogs, whereas the circuit court impermissibly relied on their size. We think that by specifying the dogs as Irish Wolfhounds, the Board was, by implication, saying that these are large dogs. With regard to odors, the circuit court was not required to remain blind to the

fact that the animals involved were eight large dogs, not eight large rabbits.

(B)

We next examine the Board's findings and order in light of Section 2A-10 of the Montgomery County Administrative Procedures Act. That section provides, in pertinent part, that "[a]ll recommendations and/or decisions of the hearing authority ... shall be in writing, based on evidence of record and shall contain findings of fact, conclusions of law and an appropriate decision and order...."

Appellants complain that the Board's opinion does not contain proper findings of fact, but merely parrots the language of Section 5-25. We do not agree. Under the circumstances, we believe the Board's findings are adequate and comply with the statutory requirements. Although the feelings involved are complex, the facts are quite simple: since 1981, a number of large dogs have been living, mostly in the

backyard, on a one-half acre lot in a residential neighborhood. During one of the hottest, most humid months of the year, 27 such dogs lived there. The noise and stench is easy to imagine. To require more specific fact finding in this case would be distasteful and unnecessary.

Although appellants claim that the findings are unsupported by the evidence, we conclude that the evidence of a public nuisance was not only substantial, but overwhelming. The only evidence to the contrary was Ms. Bloor's suggestion that all of her neighbors are overly sensitive. The Board was not obliged to accept that suggestion and its refusal to do so does not require reverasl.

(C)

Moreover, we do not agree that the abatement portion of the Board's order is arbitrary, capricious and unnecessarily harsh and punitive. We are not insensitive to the emotional pain of losing a pet.

Nevertheless, we observe that while the Board had the authority to order all of the dogs destroyed, its order stopped far short of that. As we have noted, appellants were offered the opportunity to keep two of their dogs, and to find homes for the others. The remedy fashioned by the Board is directly related to the problem , offers some flexibility to appellants, and appears to take into account the interests of all concerned (including the dogs). We do not feel that it was arbitrary, capricious, or punitive in nature. The decision as to whether it was the best possible remedy in the circumstances was for the Board to make, using its own expertise. We are not at liberty to substitute our view for that of the Board.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY THE APPELLANTS.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

IN THE MATTER OF THE APPEAL OF ELIZABETH BLOOR AND WILBER H. FRIEDMAN FROM THE ANIMAL MATTERS HEARING BOARD	:	Civil No. 12332

OPINION

This matter is an appeal by Elizabeth Bloor and Wilbur H. Friedman from the January 14, 1986 decision of the Montgomery County Animal Matters Hearing Board. The decision of the Hearing Board is affirmed.

The Court adopts the issues presented as framed by the brief of the County Attorney. They are as follows:

I. Whether Section 5-12 of the Montgomery County Code is unconstitutionally vague because it does not provide the Board with adequate standards and guidelines for determining whether dogs are a public nuisance.

II. Whether the Board considered a Department of Animal Control file which had not been introduced into evidence.

III. Whether the Board's Order failed to comply with the Administrative Procedures Act because it did not contain findings of fact.

IV. Whether the Board's Order is based upon substantial evidence from which a reasoning mind could reasonably infer that the dogs were a public nuisance.

V. Whether the Board's Order denies the appellants equal protection of the laws.

VI. Whether the Board's Order denies the appellants due process of law because it grants authority to the Animal Control Officer to approve the relocation of the appellants' dogs without specifying guidelines for the exercise of such approval.

VII. Whether the Board's Order unlawfully takes appellants' property without just compensation.

VIII. Whether the Board's Order was punitive rather than remedial.

The Standard of review of administrative decisions is very narrow. The Circuit Court may not substitute its judgment for that of an Administrative Board where the issue is fairly debatable, and the record contains substantial evidence to support the administrative decision. Annapolis v. Annapolis Waterfront Co., 284 Md. 383, 395 (1979). The decision of the Board is presumed to be prima facie correct. Bullock v. Pelham Woods Apts., 283 Md. 505, 513 (1978).

The definition of public nuisance is set out in Mont. Code Section 5-25. Pursuant to Section 5-12 of the Code, the Board may declare that an animal or facility is a public nuisance. Section 5-25 is sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. Miller v. Maloney Concrete Co., 63 Md. App. 38, 48 (1985). Unlike the provisions reviewed by the Court in Maloney Concrete, these

provisions of the Code are not vague in that fixed standards and adequate guidelines are set out. The statute is constitutional.

The record clearly indicates there is substantial evidence to support the finding of the Board. The findings of fact, while less than a model of specificity, are ample to satisfy the requirement uner the Administrative Procedure Act and Montgomery County Code, Section 2A-01(a). The Board considered all of the evidence, particularly that of Mrs. Lau, Mrs. Leahigh, Mrs. Howley and Mr. Trollinger. The allegation that the Board considered a file which had not been introduced in evidence is a bald allegation without substantiation in the record.

The appellant further challenges the Order on the grounds that the remedy ordered is punitive rather than remedial. He argues that the remedy ordered is overly harsh and is beyond the authority granted to the agency. He also claims that the Board's Order unlawfully takes his property without

just compensation. Section 5-12 of the Code specifically authorizes the Board to abate public nuisances, and thus, the Board may take such steps as are reasonably necessary to abate the nuisance. The dogs housed on this property are adult Irish Wolfhounds, plus puppies. The adult dogs are a large breed. The limitation of two adult dogs established by the Board is not unreasonable. The appellant was given notice and full opportunity to be heard before the Board found the existence of a public nuisance. Due process has been satisfied. Appellant is not entitled to compensation in that there is no property taken for public use as that doctrine is interpreted. The exercise of the State's police power must be distinguished from the exercise of the power of eminent domain. Bureau of Mines v. Georges Creek, 272 Md. 143, 159, 160 (1974). The equal protection argument is without merit. The Order of the Board ~~is~~ not arbitrary or

capricious, but reasonably necessary to abate the public nuisance.

For the aforegoing reasons, the Order of the Animal Matters Hearing Board is affirmed.

The County Attorney shall submit an Order consistent with this Opinion.

Dated: April 23, 1986

/s/ IRMA S. RAKER
Judge of the Circuit
Court for Montgomery
County, Maryland

ANIMAL MATTERS HEARING BOARD

November 20, 1985

Margaret C. Lau 11505 College View Drive Wheaton, Maryland 20902 Complainant,	:	
vs.	:	AMHB Case No. 35-85
Elizabeth Bloor and Wilbur H. Friedman 11404 Norris Drive Wheaton, Maryland 20902 Respondents.	:	

This matter came before the Animal Matters Hearing Board at the request of Margaret C. Lau, Complainant, who sent to the Animal Matters Hearing Board a request for a hearing dated October 28, 1985. The Complainant alleged, that at the time the request for a hearing was prepared, Elizabeth Bloor owned a total of twelve (12) Irish wolfhound dogs, six (6) adults and six (6) puppies, which were creating a public nuisance by virtue of causing unsanitary, dangerous or offensive conditions due to the

size or number of animals maintained at a single location or due to the inadequacy of the facilities and by virute of making or causing noises audible within a building on adjacent property and of sufficient volume so as to disturb the quiet enjoyment of the occupants thereof. The petitioner sought a declaration by the Board that the said dogs are a public nuisance pursuant to Chapter 5, Section 5-25 (c) and (d) of the Montgomery County Code. A hearing on the merits was held on November 20, 1985. The Complainant and Respondents presented their cases pro se and the Board met in executive session to deliberate on the testimony and evidence.

FINDING OF FACT

The Animal Matters Hearing Board, having considered all of the testimony and evidence presented at the hearing finds from the testimony of Mrs. Lau, Mrs. Leahigh, Mrs. Howley and Mr. Trollinger that twenty-seven (27) dogs of various ages were owned and controlled by the Respondents during the year

1985 and at the present time there are eight (8) adult dogs owned and controlled on the Respondents' property.

The Board finds, by a preponderance of the evidence, that the barking and howling of the Respondents' dogs as described by the Complainant and the Complainant's witnesses constitutes a public nuisance in that the dogs make or cause noise audible within a building on adjacent property and of sufficient volume so as to disturb the quiet enjoyment of the occupants of the Lau, Leahigh, Howley and Trollinger residences.

The Board also finds, by a preponderance of the evidence, that the dogs owned and controlled by the Respondents on their property constitute a public nuisance in that they create unsanitary and offensive conditions by virtue of the number of animals maintained at the facility and due to the inadequacy of the facility at the Respondents' residence.

ORDER

As a result of the foregoing finding of fact the Animal Matters Hearing Board hereby orders pursuant to Chapter 5, Section 5-12(d) that all of the eight (8) dogs currently owned by the Respondents shall be delivered to the custody of the Montgomery County Animal Control Officer unless the following conditions are met:

1. That within seven (7) days of the receipt of this document all but two (2) of the dogs shall be turned over to the Montgomery County Animal Control Officer or placed elsewhere with the Animal Control Officer's approval and that no more than two (2) dogs shall be permitted at the Respondent's residence unless expressly authorized by the Board.
2. That any such dogs that remain on the Respondents' property shall be taken into the Respondents' residence before 10:00 PM and not

let out before 7:00 AM each and every morning and that between said hours a dog shall only be permitted out of the Respondents' residence for toilet purposes while on a leash and under the direct physical control of an adult.

Date: _____

/s/ Roger W. Galvin,
Acting Chairman
Animal Matters
Hearing Board

APP.FRI

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 89
September Term 1987
(No. 792, September Term. 1986
Court of Special Appeals)

ELIZABETH A. BLOOR, et al.

v.

MONTGOMERY COUNTY, MARYLAND

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled case, it is this 28th day of October, 1987

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/ Robert C. Murphy,
Chief Judge

IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 89
September Term 1987
(No. 792, September Term. 1986
Court of Special Appeals)

ELIZABETH A. BLOOR, et al.

v.

MONTGOMERY COUNTY, MARYLAND

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy,
Chief Judge

Date: July 1, 1987

COURT OF SPECIAL APPEALS
Courts Of Appeal Building
Annapolis, Md. 21401-1699

April 22, 1987

Wilbur H. Friedman
Elizabeth A. Bloor
11404 Norris Drive
Silver Spring, Md. 20902

Re: Elizabeth A. Bloor et al v. Montgomery County
No. 792, September Term 1986

Dear Mr. Friedman and Ms. Bloor:

Please be advised that your Motion for Reconsideration was denied by order of this Court dated April 21, 1987.

The mandate of this Court, which was issued today, is enclosed.

Very truly Yours,

/s/ Howard E. Friedman, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILBUR H. FRIEDMAN
Plaintiff
v. CIVIL NO. JH-86-3640
THOMAS B. FERGUSON, et al.
Defendants

MEMORANDUM

Pending before the court is plaintiff's complaint filed pursuant to 42 U.S.C. Sec. 1983 and alleging that he was denied a "dog fancier's license" in violation of his constitutional rights. Named as defendants are the Director of the Montgomery County Department of Animal Control, his advisors and the Chairman and other members of the Animal Matters Hearing Board ("Board").

The immediate matter under consideration herein is defendant's motion for summary judgment. In their motion defendants contend that, under the facts of this case, summary judgment must be granted because litigation of this matter is precluded by the doctrine of collateral estoppel; this Court should abstain in accordance with Younger v. Harris,

401 U.S. 37 (1971); and that defendants are entitled to qualified immunity. Upon review of the pleadings, this Court finds that no hearing is necessary. Local Rule 6(G).

The doctrine of Younger v. Harris, supra, or "abstention" arises not from "lack of jurisdiction in the District Court, but from strong policies counseling against the exercise of such jurisdiction where particular kinds of state proceedings have already been commenced." Ohio Civil Rights Commission v. Dayton Christian Schools, ___ U.S. ___, 106 S. Ct. 2718, 2733 (1986). The Younger principle, first applied to state criminal proceedings, has since been held applicable to state administrative proceedings where important state interests are involved and where plaintiff would have a full and fair opportunity to litigate his Constitutional claim. Gibson v. Berryhill, 411 U.S. 564 (1973) (a state administrative proceeding addressing the revocation of a

license to practice medicine required abstention); Middlesex County Ethics Committee v. Garden State Bar Assn. 457 U.S. 423 (1982). (federal courts should abstain from enjoining lawyer disciplinary proceedings initiated by state ethics committee).

In the present case, plaintiff has challenged the denial of his request for a dog fancier's license and the matter is currently pending an appealable administrative proceeding. Such matters of public health and safety are inherently within the province of state and local government.

In his memorandum responding to defendants' motion for summary judgment, plaintiff alleges, in a conclusory manner, that he is being subjected to harrassment by the County Attorney's Offices. This statement, and all others, are seemingly incorporated in plaintiff's brief affidavit.

The Court has reviewed plaintiff's memorandum and finds insufficient facts to support this charge. Indeed, it is the plaintiff who has persisted in the prosecution of this matter. Furthermore, the transcripts of various proceedings before the board and the state court opinions submitted in support of plaintiff's motion show that plaintiff has not been unable to obtain a full and fair hearing of all his constitutional claims before the state tribunals. Accordingly, this Court will abstain from deciding the matter.

In addition, the Court notes that the matters alleged in plaintiff's complaint have previously been alleged and decided in state courts. "Allen [v. McCurry], 449 U.S. 90 (1980) made clear issues litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal Sec. 1983 suit as they enjoy in the court of the state in which they were rendered. Migra v. Warren City District Board of Education,

et al., 465 U.S. 75, 83 (1984).

Accordingly, summary judgment in favor of the defendants will be granted by separate order.

/s/ Joseph C. Howard, United States District Judge

Dated: 8/27/87